Filed 12/5/13 P. v. Brown CA5

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DAVID WAYNE BROWN,<br><br>Defendant and Appellant. | F065960<br><br>(Super. Ct. No. F12903347)<br><br>**O P I N I O N** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Poochigian, J., and Franson, J.

Pursuant to a plea agreement, appellant, David Wayne Brown, on June 11, 2012,[1] pleaded no contest to attempted second degree robbery (Pen. Code, §§ 211; 212.5, subd. (c); 664)[2] and admitted allegations that he had suffered a 2004 federal court conviction of bank robbery that qualified as both a serious felony conviction under section 667, subdivision (a) and as a "strike."[3] One of the terms of the plea agreement was that appellant would receive a sentence of no more than seven years eight months.

On August 1, appellant filed what is commonly called a "*Romero* motion"[4] in which he "invite[d] the court to dismiss" the strike allegation.

On August 22, the following occurred: An amended criminal complaint was filed in which it was alleged, inter alia, that appellant had suffered a second strike, viz., a conviction in 2000 of making criminal threats (§ 422); appellant admitted the new strike allegation; and the court struck that allegation pursuant to section 1385, denied appellant's *Romero* motion with respect to the 2004 bank robbery conviction, and imposed a prison term of seven years eight months, consisting of the 16-month lower term doubled to 32 months pursuant to the three strikes law, plus five years on the prior serious felony enhancement.

On October 11, appellant filed a timely notice of appeal in which he requested the court issue a certificate of probable cause (§ 1237.5). The court denied that request.

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[1] Except as otherwise indicated, all further references to dates of events are to dates in 2012.

[2] All statutory references are to the Penal Code.

[3] We use the term "strike" as a synonym for "prior felony conviction" within the meaning of the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

[4] See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant, in response to this court's invitation to submit additional briefing, has filed a supplemental brief in which he makes the contentions we discuss below.[5] We affirm.

## FACTS

On May 1, appellant entered a bank in Fresno. He told a teller, "'I need to make a withdrawal; do it quickly and be calm about it,'" and showed her a check he was holding, on the back of which was written, "'This is a robbery.'"

The teller locked her cash drawer, walked over to a bank manager and told the manager she was being robbed. The manager called 911. In the meantime, appellant walked out of the bank.

## DISCUSSION

### *Cruel and/or Unusual Punishment*

Appellant first contends his sentence is grossly disproportionate to the instant offense and therefore constitutes cruel and/or unusual punishment within the meaning of the state and federal constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) He bases this argument, in turn, on the following claims: The instant offense is "relatively minor"; in committing it he did not use a weapon, make threats, engage in "menacing" conduct, inflict injury or cause economic loss; he "suffers from Mental Health issues"; his strike offense was "a different type of offense than the instant offense"; and his sentence "punish[es] [him] twice" for his strike offense.

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**5** In granting appellant's request to file his supplemental brief late, this court inadvertently identified appellant's supplemental brief as an opening brief, and as a result, respondent filed a respondent's brief. This court then ordered that appellant's counsel could file a response to respondent's brief within 10 days of the date of the order. Appellant's counsel did not file further briefing.

As indicated above, appellant's argument focuses almost entirely on the instant offense. Except to raise the claims that he is being punished twice for his 2004 bank robbery conviction and that the instant attempted bank robbery is somehow different than his 2004 bank robbery, he ignores his criminal history, which is as follows: As a juvenile, appellant suffered adjudications of four misdemeanors — battery in 1993; hit and run driving with property damage and resisting a peace officer in 1995; and "Failure to Obey Juv Court" in 1996, and one felony: preventing or dissuading a witness from testifying by threat or force in 1993. As an adult, he has suffered misdemeanor convictions of reckless driving and possession of marijuana in 1997; possession of a dangerous weapon in 2001; and making terrorist threats in 2000;[6] and convictions of the following felonies: aggravated assault in 2000, for which he was sentenced to prison; possession of a controlled substance while armed in 2002, for which he was again sentenced to prison; and bank robbery in 2004.

A sentence violates the California Constitution if "it is so disproportionate to the crime for which it is [imposed] that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) Appellant's argument ignores the fact that "Under the three strikes law, defendants are punished not just for their current offense but for their recidivism." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823 (*Cooper*).) "When faced with recidivist defendants such as [appellant], California appellate courts have consistently found the Three Strikes law is not cruel [or] unusual punishment." (*People v. Mantanez* (2002) 98 Cal.App.4th 354,

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**6** A violation of section 422 may be punished as either a felony or a misdemeanor (§ 422, subd. (a)). At a proceeding on August 8, 2012, the court stated it had reviewed the "court file" and determined that in March 2000, appellant entered a plea of either guilty or no contest to a felony charge of violating section 422, but in May 2002, the court reduced the offense to a misdemeanor (§ 17, subd. (b)), effective, nunc pro tunc, April 7, 2000.

359.) As this court stated in *Cooper*, at p. 826, "Appellant's intractable recidivism, coupled with his current offense, justify the term imposed." Thus, appellant's claim of cruel and unusual punishment under the California Constitution fails.

Appellant's recidivism is also fatal to his argument under the federal standard. The protection afforded by the Eighth Amendment is narrow. It applies only in "'exceedingly rare'" and "'extreme'" cases. (*Ewing v. California* (2003) 538 U.S. 11, 21 (plur. opn. of O'Connor, J.).) "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Id*. at p. 25.) Given appellant's criminal history, his sentence of seven years eight months for his most recent felony conviction is not so extreme as to constitute cruel and unusual punishment under the federal Constitution.

***Double Jeopardy***

Appellant next contends the imposition of an increased sentence under the three strikes law violated the protections against double jeopardy provided by both the California and United States Constitutions.[7] This claim too is without merit.

The double jeopardy clause of the federal Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." (U.S. Const., 5th Amend.; see *Benton v. Maryland* (1969) 395 U.S. 784, 794 [holding double jeopardy clause applicable to states through 14th Amend.].) The California Constitution contains a virtually identical provision. (Cal. Const. art. 1, § 15 ["Persons may not twice be put in jeopardy for the same offense"].) Both of these constitutional provisions

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[7] Appellant did not raise this claim below. We assume without deciding it is cognizable on this appeal.

"protect against multiple punishment for the same offense." (*People v. $1,930 United States Currency* (1995) 38 Cal.App.4th 834, 845.)

The imposition of sentence under the three strikes law, however, does not constitute multiple punishment for the same offense. Although appellant's status as a repeat offender subjects him to harsher punishment under the three strikes law, he is not being punished in the instant case for his strike conviction. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1520.) "Recidivist statutes do not impose a second punishment for the first offense in violation of the double jeopardy clause of the United States Constitution." (*Ibid*.) And we see no reason why a different rule should obtain under the California Constitution. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353 ["'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution'"].)

***Ineffective Assistance of Counsel***

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To meet this burden, "a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant ...." (*People v. Lewis* (2001) 25 Cal.4th 610, 674.)

Appellant first argues that he was denied his right to the effective assistance of counsel because his trial counsel falsely represented to him that the court would strike appellant's 2004 strike. There is no indication in the record, however, that counsel made any such representation. Therefore, this contention is not cognizable on this appeal. (*People v. Smith* (2007) 40 Cal.4th 483, 507 ["matters outside of the record … may not be considered on appeal"].)

Appellant next argues that counsel was constitutionally ineffective in failing to conduct an adequate investigation of appellant's criminal history. To address this contention, we must first provide some background:

Initially, in the complaint filed May 10, the People alleged appellant had suffered one strike, viz., the 2004 bank robbery conviction in federal court. After appellant entered his plea and admissions, the probation officer prepared a presentence report (RPO) in which she indicated that in 2000, appellant had suffered a conviction of making terrorist threats in violation of section 422. In the RPO, the offense bore the notation "F." On August 1, at the time set for sentencing, the court expressed concern that appellant's section 422 conviction was a felony that qualified, but had not been alleged, as a strike. Both counsel indicated the offense had been charged as a felony but later reduced to a misdemeanor. Defense counsel stated that because it was not alleged as a strike he assumed it was misdemeanor and for that reason did not investigate further. The court, stating "If it was ever plead as felony, a reduction does not change and take away from the applicability of a strike," continued sentencing to allow the parties to investigate the status of the section 422 conviction. At a subsequent proceeding, the court, after reviewing the transcript of the 2002 proceeding in which the offense was reduced to a misdemeanor, noted that the judge at that proceeding had expressed "the intention … that [the 2000 section 422 conviction] would never be considered a serious felony conviction for future purposes." And, as indicated above, the court in the instant case later allowed the People to amend the complaint to allege the section 422 conviction as a strike and then struck the allegation.

Appellant faults his trial counsel for not investigating, prior to the date first set for sentencing, whether the offense had in fact been reduced to a misdemeanor. This purported failure, however, was not objectively unreasonable. The offense had not been alleged as a strike; there was no reason for counsel to learn more about it. Moreover, at

sentencing, defense counsel argued successfully that the strike allegation based on the 2000 section 422 conviction should be stricken. Nothing in the record even remotely suggests trial counsel was ineffective.

***Romero* Motion**

Appellant contends the court erred in denying his *Romero* motion as to his 2004 bank robbery conviction. There is no merit to this contention.

Section 1385 provides, in relevant part, "The judge or magistrate may, ... in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) In *Romero*, *supra*, 13 Cal.4th at pp. 529-530, the California Supreme Court concluded that section 1385, subdivision (a) permits a court to strike a strike, and in *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), our high court set forth the factors relevant to a court's determination of whether to do so: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to [section 1385, subdivision (a)], or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id*. at p. 161.)

A superior court's determination not to strike a strike is reviewable for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In [conducting this review], we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary

determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.) "Because the circumstances must be 'extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Id*. at p. 378.)

Appellant stands convicted in the instant case of a serious offense; he has suffered multiple juvenile adjudications and prior convictions as an adult; and he has received multiple grants of probation and prison commitments. The RPO also indicates appellant was granted probation following his 2004 federal bank robbery conviction, his probation was twice revoked, he was committed to federal prison following each revocation, and he committed the instant offense just ten months after his second release. He has, thus, demonstrated an inability to refrain from committing crimes despite past sanctions and attempts to rehabilitate through probation. It cannot be seriously suggested it was irrational for the court to refuse to treat appellant as if he had not suffered a strike. Accordingly, the court did not abuse its discretion in denying appellant's *Romero* motion.

***Independent Review of the Record***

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

## DISPOSITION

The judgment is affirmed.